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No. 86-637

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

COMMUNICATIONS WORKERS OF AMERICA, *et al.*,
Petitioners,

v.

HARRY E. BECK, JR., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

It is useful to begin by placing the issues posed here in the broader context within which those issues arise.

In our legal system, absent a statutory prohibition, private parties are generally free to contract on the terms they desire, and to establish conditions on their willingness to enter into further contracts with third persons. This rule applies to the realm of employment contracts no less than to other contract realms. Thus, absent statutory constraints, an employer may, for example, condition his willingness to enter into employment contracts with would-be-employees on the employees' agreement to support a church or charity of the employer's choosing, and the employer likewise may enter into a contract with the church or charity obligating the employer to place that condition on any employment contracts into which the employer enters. *Cf. Church of Jesus Christ of Latter-Day Saints v. Amos*, —— U.S. ——, 55 L.W. 5005 (June 24, 1987).

The agreements at issue here are of this latter type: the employers have agreed with petitioners Communications Workers of America *et al.* ("the Union") not to retain in their employ individuals who fail to pay dues to the Union. So far as the record indicates, those agreements were voluntarily entered into and the employers are prepared to abide by their terms. The questions posed here are whether such "union shop" agreements violate either federal statutory or constitutional law.

Prior to the enactment of the National Labor Relations Act of 1935, the answer to that question would have been self-evident. As of that time there was no federal law law addressed to, and no conceivable basis for applying constitutional strictures to, such private agreements. And under the black letter common law of contracts of the time, the basic rule was that not only union shop agreements but also "closed-shop" agreements, obligating the employer to hire only union members, were both law-

ful and legally enforceable.[1] And, under that law employers and unions were likewise free to enter into enforceable contracts in which the employer recognized the union as the exclusive representative of his employees and agreed not to negotiate with his employees individually.[2]

The NLRA thus did not *grant* unions the power to negotiate union security agreements; rather that Act *conditioned* this preexisting freedom by prohibiting such agreements when entered into by a minority union or a company-dominated union. Congress decided in 1935 to otherwise "preserve the status quo as to the legality of closed shop agreements under the common law in the different States." 2 Legislative History of the National Labor Relations Act of 1935 at 2335 (Sen. Wagner). To make its intent in this regard explicit, Congress enacted a proviso to § 8(3) excepting such agreements from the general prohibition of discrimination based on union membership. *See* Pet. Br. at 24-25.[3] Then in the Labor Man-

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[1] *See, e.g., Mississippi Theatres Corp. v. Hattiesburg Local Union No. 615*, 174 Miss. 439, 164 So. 887 (1936); *Harper v. Electrical Workers Local 520*, 48 S.W.2d 1033 (Tex. Civ. App. 1932); *Ribner v. Rasco Butter & Egg Co.*, 135 Misc. 616, 238 N.Y.Supp. 132 (1929); *Jacobs v. Cohen*, 183 N.Y. 207, 76 N.E. 5 (1905). *See generally* 1 Teller, The Law Governing Labor Disputes and Collective Bargaining § 170 (1940); Despres, *The Collective Agreement for the Union Shop*, 7 U. Chi. L. Rev. 24, 31-44 (1939); Restatement of Contracts (First) § 515(c), illustration 18 (1932).

[2] *See, e.g., Ribner v. Rosco Butter & Egg Co., supra*, 238 N.Y. Supp. at 135; *Goldman v. Cohen*, 22 App. Div. 631, 227 N.Y.Supp. 311, 314 (1928).

Even where unions did not enjoy the status of exclusive representative by contract, a union could attain that status *de facto* by securing a closed shop agreement and by then exercising its authority over its members to discipline any member who attempted to work on terms other than those agreed to by the union. *See* 1 Teller, *supra*, at 289-90; Despres, *supra*, 7 U. Chi. L. Rev. at 35-36.

[3] Plaintiffs cite a number of cases to show that the courts, in formulating the pre-1935 common law, sought "to reconcile collective agreements with individual employment contracts." Resp. Br. at 6. But the cases plaintiffs cite concerned the extent to which

agement Relations Act of 1947 Congress went further, denying unions and employers their common-law freedom to enter into closed shop agreements and leaving only the freedom to enter into union shop agreements.

The questions presented here are whether, by placing the federal limitations just stated on union-employer agreements that impose contractual conditions on whom the employer will employ, Congress somehow either (1) proscribed agreements conditioning continued employment on the tender of full union dues; or (2) injected governmental action into such agreements so as to implicate constitutional concerns. As we proceed to show, respondents' effort to establish that those two questions should be answered in the affirmative is wholly unavailing.

I. THE § 8(a)(3) ISSUE

Plaintiffs concede that the provisos to NLRA § 8(a)(3) in so many words permit union security agreements providing that the employees in a represented bargaining unit are to tender to their union representative an amount equal to " 'dues' and 'fees' " as a condition of continued employment. *See* Resp. Br. at 17-18. But plaintiffs contend that the statutory words leave open the "question of what Congress meant by the words 'dues' and 'fees,' " *id.* at 17 n.60, and in particular whether " 'dues' and 'fees' in Section 8(a)(3) refer to whatever a union

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collective agreements were enforceable by, or as against, *individual employees*. As plaintiffs correctly note, in that context the courts "did develop [a number of] theories" of enforceability. *See* Resp. Br. at 6-8; *see also Harper v. Electrical Workers Local 520, supra*, 48 S.W. 2d at 1039-40, where the various theories are reviewed. That question is entirely distinct from the question of whether promises made by an employer to a union—such as a promise to hire only union members—is enforceable by the union as against the *employer*. On this latter question—the only one of relevance here—the law was clear. As the 1935 Congress correctly understood, the basic common law rule was that employers and unions that wished to do so were free to enter into, and abide by, closed shop and other union security agreements without securing the consent of "objecting employees" and without violating any of the rights of such employees.

charges its voluntary members for its institutional activities . . . that is, 'full union dues,' " *id.* at 17-18. And plaintiffs reach the remarkable conclusion that "[i]rrespective" of whether union security agreements between private parties in an industry regulated by the NLRA are "infus[ed]" with " 'governmental action,' " the words "dues and fees" when "read in light of [§ 8(a)(3)'s] legislative purpose" are "most reasonabl[y]" read to refer not to the periodic amount a union charges its voluntary members but to the *portion* of that amount that the union expends on "statutory collective bargaining." *Id.* at 17, 40.

In responding to plaintiffs' argument, we put to one side the implausibility as a matter of simple English usage of reading the word "dues" (or "fees") to refer to a portion of the amount paid as such by union members as a condition of continued membership. For plaintiffs' argument suffers from far more fundamental flaws: that argument flies in the face of (A) the statutory language of § 8(a)(3); (B) the legislative history of that section; and (C) this Court's decisions interpreting the section.

A. In their exegesis on § 8(a)(3), plaintiffs look to the words of NLRA §§ 2(5), 7, 8(d) & 9(a), *see* Resp. Br. at 19-20; the one place plaintiffs do *not* look is to the words of § 8(a)(3) itself. Indeed, plaintiffs conveniently refrain from quoting § 8(a)(3) in full at any point in their brief.[4]

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[4] Plaintiffs also misread the provisions cited in their brief in contending that under the Act a union represents bargaining-unit employees "only with respect to . . . Section 9(a) concerns," and engages in "*extra*-statutory actions," in engaging in activities other than bargaining over the mandatory bargaining subjects delineated in §§ 9(a) & 8(d). Resp. Br. at 39-40 (emphasis in original). "Labor organization" is defined in § 2(5) as "any organization . . . which exists for the purpose, in whole *or in part*, of dealing with employers . . ."; far from being "intentionally narrow," Resp. Br. at 19, the definition "is phrased very broadly." S. Rep. No. 573, 74th Cong., 1st Sess. at 7 (1935), in recognition of the multiple activities in which unions engage. And in enacting

Plaintiffs' omission is surely understandable—if not forgivable—for the language of § 8(a)(3) simply does not leave room for the ambiguity that plaintiffs first posit and then purport to resolve. Contrary to the impression plaintiffs attempt to leave, § 8(a)(3) does not speak of "dues" or "fees" that bargaining unit employees covered by a union security agreement may be required to tender to their union representative, rather, the section speaks of (and only of) "the periodic dues and the initiation fees *uniformly required as a condition of acquiring or retaining membership.*" Thus, the section, in terms, defines "dues" and "fees" (or more precisely "periodic dues" and "initiation fees") as those dues and fees "uniformly required" of all members, *viz.*, as the "full dues" paid by "voluntary members" and *not* as a portion of full dues.

B. Plaintiffs' proposed construction of § 8(a)(3) is equally at war with the statutory history.

(1) To begin with, plaintiffs' fundamental theory is wholly ahistoric. Plaintiffs argue that because "only a Section 9(a) representative may compel payments from nonunion employees" and because under § 9(a) an exclusive union representative "may compel [nonunion] employees to accept its decisions only as to 'collective bargaining,'" it follows that the § 8(a)(3) provisos permitting union security agreements must "limit the representative's use of those payments to 'collective bargaining,' too." Resp. Br. at 20. Plaintiffs' conclusion in that regard is refuted by the simple fact that it was the *1935 Congress*—and not the 1947 Congress—that determined to exempt from federal prohibition only union security agreements between employers and § 9(a) rep-

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§ 7, Congress chose "to protect concerted activities for the somewhat broader purpose of mutual aid or protection as well as for the narrower purposes of self-organization and collective bargaining." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). As *Eastex* illustrates, all employees in a bargaining unit benefit from "concerted activities for . . . mutual aid or protection" whether or not those activities take the "narrower" form of "collective bargaining."

resentatives. And under the 1935 Act, the condition that only a § 9(a) representative may enter into a union security agreement clearly was *not* intended to invalidate an agreement providing for the payment of full union dues; the 1935 Act allowed agreements for the *closed* shop, whereby the covered employees were required to comply with *all* the conditions of union membership, including all financial obligations, *without limitation*.[5] Thus, the fact that under the NLRA only a § 9(a) representative may enter into a union security agreement does not permit—let alone require—the inference that the representative's expenditures of moneys received pursuant to such agreement are limited by § 9(a).

(2) More generally, the legislative debates concerning § 8(a)(3) in 1947, when that section assumed its present form, refute plaintiffs' claim that Congress intended to prohibit union security agreements that require the tender of full union dues. We devoted seventeen pages of our opening brief to tracing § 8(a)(3)'s evolution step-by-step. *See* Pet. Br. at 23-40. Plaintiffs dismiss that review in a single footnote, stating that "CWA dilates on 'legislative history' . . . [b]ut this history begs the question of what Congress meant by the words 'dues' and 'fees.' ". Resp. Br. at 18 n.60. And then, in a two-page section of their brief containing only a single citation to the legislative materials, *see id.* at 21-22, plaintiffs contend that their reading of the statute "find[s] vindication in the overriding congressional purpose underlying

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[5] It is interesting to note that in the evolution of the Wagner Act the permission for closed-shop agreements predated the grant to majority representatives of the status of exclusive representative. Thus, in 1934, the Senate Labor Committee reported out a predecessor of the Wagner Act, which permitted union shop agreements "if the agreement is sought by the majority of employees in the unit covered by it when made" but which left it for the NLRB to decide, in its discretion, whether "representatives agreed upon by the majority of employees in an appropriate unit shall represent the entire unit for the purpose of § 10(a)." 1 Legislative History of the National Labor Relations Act of 1935 at 1087-88.

the Section 8(a)(3) provisos: namely, to eliminate so-called 'free-riders,'" *id.* at 21. Plaintiffs misunderstand the legislative materials.

To begin with, the legislative history which plaintiffs so cavalierly dismiss demonstrates that the § 8(a)(3) provisos were shaped by a complex of concerns and *not*, as plaintiffs would have it, by a single-minded focus on free-riding. While the free-rider concern was a significant one, the proponents of the provisos were at least equally animated by a second object: maintaining industrial peace and stability in the circumstances of the time. As Senator Taft put it: "because the union shop has been in force in many industries for so many years . . . to upset it today probably would destroy relationships of long standing and probably would bring on more strikes than it would cure." 2 Legislative History of the Labor Management Relations Act of 1947 at 1010 ("LMRA Leg. Hist."). And the proponents also sought to assure that under the law Congress crafted, the amount owed by nonmembers would be "readily ascertainable" so as not to require employers or the government "to inquire into the internal affairs of the union." S. Rep. No. 105, 80th Cong., 2d Sess. at 20 (1947); *see* Pet. Br. at 29, 35-36, 38.

These intensely practical concerns were in turn reinforced by a recognition of the political realities confronting those who were seeking to place some restrictions on the range of union security agreements permitted by federal law as of 1947; such legislation faced a "predictable presidential veto," *Pipefitters v. United States*, 407 U.S. 385, 409 (1972), and thus would need the support of two-thirds of the closely-divided Senate if the veto were to be overriden. That reality—as well as (or, perhaps, without regard to) their views as to the ultimate merits of union security agreements—led Senator Taft and his allies to conclude that "it would be a mistake to go to the extreme of absolutely outlawing a contract which provides for a union shop" and instead to adopt the approach "of dealing with the abuses which had

appeared" in the broad range of permissible union security agreements as of 1947. 2 LMRA Leg. Hist. at 1420. *See also, e.g.*, 2 *id.* at 1061, 1077 (Sen. Ellender). And the only such abuses Senator Taft and his colleagues perceived (or chose to address) concerned the union power to arbitrarily or discriminatorily exclude from employment individuals who were willing to pay the applicable union dues. *See* Pet. Br. at 30-31. For this reason alone the legislative history cannot be read as showing a congressional intent to invalidate the standard union shop agreement that calls for the tender of full union dues.

Moreover, to the extent that § 8(a)(3) was shaped by the 1947 Congress' concern over the free-rider problem, the legislative materials make it plain that Congress saw the problem, and its solution, quite differently than do plaintiffs. Thus, for example, in introducing the Senate Committee bill on the floor, Senator Taft stated that "what we do, in effect, is to say that no one can get a free ride," and then Senator Taft immediately went on to explain that what § 8(a)(3) provides in that regard is that "[t]he employee has to pay *the union dues.*" 2 LMRA Leg. Hist. at 1010 (emphasis added). And later in the debates Senator Taft made even more explicit what could be required of all employees in a bargaining unit: to "*pay the same dues as other members of the union.*" 2 *Id.* at 1142.[6] In short, § 8(a)(3)'s legislative history shows that Congress meant precisely what the plain words of the provision say: "dues" means those sums "uniformly required [by the union representative] as a condition of acquiring or retaining membership."

(3) Plaintiffs attempt to find comfort in the fact that, as we explained in our opening brief, the legislative materials show that § 8(a)(3) was modeled after the "Rand Formula." *See* Pet. Br. at 33-34; Resp. Br. at 21-22.

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[6] *See also* Pet. Br. at 26 (quoting House Labor Committee Report), 27-28 (quoting House debates), 29 (quoting Senate Labor Committee Report), 30-33 (quoting Senate debates), 34-35 (quoting House conference report).

Plaintiffs state that "[t]he 'Rand Formula' . . . unequivocally applied the 'free-rider' thesis" and thus "amounts to a precursor of the 'test' this Court adopted under Section 2, Fourth and 2, Eleventh of the [Railway Labor Act]." Resp. Br. at 21-22. Plaintiffs could not be more mistaken.

In fashioning a union security provision for the parties in an interest arbitration, Justice Rand concluded that "[i]t is irrelevant to try to measure benefits in a particular case; the protection of organized labor is premised as a necessary security to the body of employees." *Ford Motor Co. of Canada*, 1 BNA Lab. Arb. 439, 444 (1946). Thus, Justice Rand entered an award requiring all employees in the bargaining unit to pay "such sum as may from time to time be assessed by the union on its members according to its constitution"; Justice Rand defended this requirement on the ground that "*the dues* are only those which members are satisfied to pay for substantially the same benefits, and as any employee can join the union . . . I see no serious objection in this circumstance." *Id.* at 445 (emphasis added).[7]

(4) Plaintiffs end up placing their principal reliance on amendments to the Railway Labor Act ("RLA"), which were enacted in 1951, four years *after* the LMRA. Plaintiffs contend that the 1951 Congress intended those amendments to have the same meaning as NLRA § 8(a)(3); from that premise plaintiffs argue that this

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[7] While requiring nonmembers to pay the full amount of periodic union dues, Justice Rand determined not to require nonmembers to pay "any entrance fee" or any "special assessment or . . . an increment in an assessment which relates to special union benefits such as, for instance, union insurance, in which the nonmember employee as such would not participate for the benefit of which he would not enjoy." 1 BNA Lab. Arb. 445-46; *see also* Dudra, *Approaches to Union Security in Switzerland, Canada and Columbia*, 86 Monthly Lab. Rev. 136, 138 (1963). Congress, in crafting § 8(a)(3), decided to depart from the Rand formula in one respect: § 8(a)(3) *does* permit union security agreements which require nonmembers to pay "initiation fees."

Court's interpretation of RLA § 2, Eleventh in *Machinists v. Street*, 367 U.S. 740 (1961), should control the meaning of NLRA § 8(a)(3) as well. Plaintiffs' argument fails at each step in its progression.[8]

(a) To begin with, plaintiffs are wrong in asserting that the "linguistic parallel" between NLRA § 8(a)(3) and RLA § 2, Eleventh is "exact." Resp. Br. at 24. RLA § 2, Eleventh permits union security agreements that provide for the payment of "assessments" (as well as of dues and initiation fees); RLA § 2, Eleventh applies "[n]otwithstanding . . . any other statute or law . . . of any State"; and RLA § 2, Eleventh allows certain classes of railroad employees to satisfy their obligations under union security agreements by belonging to a labor organization other than the one that represents them. In each of these respects, NLRA § 8(a)(3) is precisely to the contrary. *See also* Pet. App. 97a (Winter, J., dissenting).

More importantly, contrary to plaintiffs' assertion the two statutes do not "reflect[] an identity of purpose." Resp. Br. at 26. Plaintiffs' characterization of RLA § 2, Eleventh as "animated" by the "limited purpose" of "address[ing] . . . the 'free-rider' issue," Resp. Br. at 24, is fair enough given the situation that informed that section's enactment: prior to 1951 the "railway industry [was] marked . . . by a strong and long-standing tradition of voluntary unionism . . . [and] by . . . a congressional policy of complete freedom of choice . . . to join or not to join a union" and the 1951 amendments were intended as an "inroad[]" on "the policy of full freedom

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[8] Plaintiffs' argument necessarily assumes that the 1951 Congress understood § 2, Eleventh as that section was ultimately construed in *Street*. But that is by no means certain; *Street*'s construction, while "entirely reasonable" as a means of avoiding "constitutional questions . . . of the utmost gravity," 367 U.S. at 749-50, nonetheless was "not without its difficulties" and was adopted "precisely to avoid the constitutional issues presented," *Abood v. Detroit Board of Education*, 431 U.S. 209, 232 (1977). For purposes of the discussion that follows, however, we indulge plaintiffs' assumption.

of choice" for the "limited purpose of eliminating the problems created by the 'free rider.'" *Street*, 367 U.S. at 750, 767; *see* Pet. Br. at 41-42. But as we have seen the 1947 amendments to NLRA § 8(a)(3) cannot be so characterized: prior to 1947 the NLRA *permitted* all forms of union security agreements as a matter of federal law (including closed shops), and the 1947 amendments (to paraphrase *Street*) were enacted for the limited purpose of eliminating the abuses concerning direct union interference with employment that had arisen in closed shops. Pp. 6-8, *supra*. Thus, in their genesis and in their purposes, RLA § 2, Eleventh and NLRA § 8(a)(3) are *not*, as plaintiffs' claim, "parallel" and do *not* call for identical interpretations.

(b) Plaintiffs contend that statements in the legislative history of the 1951 amendments to RLA § 2, Eleventh show that the 1951 Congress viewed those amendments as "identical" to the amendments that had been made to NLRA § 8(a)(3) in 1947. But even if that were true, its only possible relevance in this case would be to evidence the 1951 Congress' understanding of a statute *the 1951 Congress did not enact*. The relevant question here, however, is what the 1947 Congress intended by the statute that *the 1947 Congress enacted*. And "it is well settled that 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" *Russello v. United States*, 464 U.S. 16, 26 (& cases cited therein) (1984).

Plaintiffs moreover misstate what was said about NLRA § 8(a)(3) when RLA § 2, Eleventh was amended in 1951. Plaintiffs' argument depends on taking a phrase of Senator Taft's out of context and asserting that the Senator "characterized" the provisions of RLA § 2, Eleventh as "'*identical* with the Taft-Hartley law.'" Resp. Br. at 26 (emphasis supplied by respondents). But Senator Taft's floor statement, from which respondents quote selectively, begins as follows: "In effect, the bill inserts in the railway mediation law *almost the exact provisions, so*

far as they fit, of the Taft-Hartley law, so that the conditions regarding the union shop and the check-off are carried into the relations between railroad unions and the railroads." 96 Cong. Rec. 16267 (1950) (emphasis added). Senator Taft then went on to explain that he had "objected to some of the original terms of the bill" but that "when the proponents agreed to accept amendments which made the provisions identical with the Taft-Hartley law, I was willing to concur in those amendments." *Id.*[9] Thus, the referent of "provisions" in Senator Taft's statement is not § 2, Eleventh as a whole but the particular elements (or "provisions") of § 2, Eleventh to which Senator Taft had objected and which in deference to his objection had been subjected to narrowing amendments. Indeed, Senator Taft immediately thereafter acknowledged, in a colloquy with Senator Holland, that he "did not intend . . . to give the impression that [§ 2, Eleventh] would . . . contain the provision of the Taft-Hartley law [NLRA § 14(b)] respecting and giving effect to the ["right-to-work"] provisions of the State constitutions and States statutes." *Id.*

C. Given the clarity of § 8(a)(3)'s language and history—and given the irrelevance of decisions under RLA § 2, Eleventh—it is not at all surprising that two years after *Street*, this Court, in a case arising under NLRA § 8(a)(3), approved a union security proposal that would have conditioned employment "upon the payment of sums equal to the initiation fees and regular monthly dues paid by the union members." *NLRB v. General Motors Corp.*, 373 U.S. 734, 736 (1963). And, in a companion case decided the same day as *General Motors*, the

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[9] The amendments to the bill to which Senator Taft referred provided first, that nonmembers shall not be required to pay "fines and penalties"; second, that nonmembers shall not be required to pay dues to more than one labor organization; and third, that employers shall not deduct union dues from employees' pay absent a written authorization from the employee. *See* Legislative History of the Railway Labor Act, As Amended (1926 through 1966) at 1096-97, 1103, 1123, 1135-37.

Court, after explicitly recognizing that "dues collected from members may be used for a 'variety of purposes, in addition to meeting the union's costs of collective bargaining,'" held that an agreement requiring nonmembers to pay a "service fee [which] is admittedly the exact equal of membership initiation fees and monthly dues" is legally "the same as the *General Motors* . . . arrangement." *Retail Clerks v. Schermerhorn*, 373 U.S. 746, 753-54 (1963). Thus, plaintiffs' proposed construction of § 8(a)(3) is not only contrary to the plain words and history of that section but also to this Court's prior understanding of the section.[10]

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[10] Plaintiffs acknowledge that the validity of their duty of fair representation ("dfr") claim rests on their statutory claim that "the only 'dues' permissible under § 8(a)(3) are the exclusive representative's cost of statutory 'collective bargaining,'" Resp. Br. at 41; *see also id.* at 37 part II, first sentence. Since we have met that statutory claim in text—and since plaintiffs discuss their dfr claim only in their "more detailed consideration" of the applicability of the preemption doctrine of *San Diego Unions v. Garmon*, 359 U.S. 236 (1958), Resp. Br. at 37, and the parties agree that *Garmon* is inapplicable to plaintiffs' dfr and constitutional claims—we treat separately with the duty of fair representation only in this footnote.

Plaintiffs' assertion that the Union's conduct here has "discriminatory effects," Resp. Br. 39, admittedly depends on their statutory premises that "Sections 8(a)(3) and 9(a) license CWA to extract from the Employees only [collective bargaining expenditures] by force of law," *id.* at 38-39. But as we have shown: (1) the dues payments specified in the union security agreement here are required not by "force of law" but by the agreement between the employer and the Union; and (2) the 1947 Congress determined in enacting § 8(a)(3) that these parties are permitted to negotiate agreements which provide that bargaining unit employees are to pay full union dues, not merely the moneys necessary to cover "collective bargaining expenditures" narrowly defined. In arguing that by requiring the equal payment of union dues the Union "discriminates" against them in favor of "voluntary members", plaintiffs err also because in permitting unions and employers to agree on such a requirement, Congress necessarily contemplated, and accepted, that the payment would be "involuntary" as to some employees of some employers. And Congress nonetheless determined that "nothing in this Act or any other statute of the United States shall preclude such agreements," and thus that as long as the monetary obligation

II. THE GOVERNMENTAL ACTION ISSUE

In the lower courts plaintiffs' main "government action" theory was that "the statutory authorization of the agency shop clause was sufficient state action to subject the union's expenditures . . . to constitutional scrutiny" and plaintiffs claimed to derive that theory from *Railway Employes' Dept. v. Hanson*, 351 U.S. 225 (1956).[11] In *Hanson*, however, this Court found state action not because union security agreements are authorized by the RLA but because, under the RLA—in contrast to the situation under NLRA § 14(b)—such agreements supersede any contrary state law and in that sense have the force of federal law. *See* Pet. Br. at 19-21.

Belatedly recognizing as much, plaintiffs now abandon their "authorization" theory and their reliance on *Hanson*; indeed plaintiffs now state that "[e]xplication of *Hanson*'s shadowy verbiage is not worthwhile," but that *Hanson* does not "preclude the discovery of *other* bases

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is uniform, any difference in "effects" between "voluntary" and "involuntary" dues payors does not make out a claim of unlawful discrimination under any federal law.

In arguing that the Union breached its duty of fair representation here, plaintiffs state repeatedly that only 19% of the dues and fees received by the Unions were spent for collective bargaining. Resp. Br. at 39, 41, 52. While the point is irrelevant to the legal issue before the Court, we note that plaintiffs misstate what "the record emphasizes," *id.* at 39. The Special Master found that because the Union did not separately account for collective bargaining expenditures, the Union was able to prove by "clear and convincing evidence" collective bargaining expenditures that amount to only 19% of total expenditures. Pet. App. at 120a-123a. These findings were *vacated* by the court of appeals because the "special master erred in his standard of proof," *id.* at 74a, and the court below could not determine to what extent this error infected the master's conclusions, *id.* at 79a-80a.

[11] The quotation in text comes from the Brief in Response to Appellants/Cross-Appellees and in Support of Cross-Appeal in C.A. 4 Nos. 83-1955, 83-1956, at 21. In that brief, plaintiffs cited *Hanson* on every other page of the section headed "Supreme Court Precedent" and plaintiffs quoted extensively from that decision. *See id.* at 17-23.

for finding 'governmental action.'" Resp. Br. at 11 n.42 (emphasis in original). And plaintiffs now claim that "'[g]overnment action arises from [the union's] section § 9(a) status as the employees' exclusive representative," *id.* at 16, and from the "special legal powers and privileges" that flow from that status, *id.* at 5. That theory runs contrary to at least two decades of this Court's percedents.[12]

A. In arguing that "'[g]overnment action arises from [the Union's] Section 9(a) status," plaintiffs necessarily contend that every provision in every collective bargaining agreement negotiated by an exclusive representative is equally subject to constitutional constraints. Yet, as Justice Powell observed in his concurring opinion in *Abood*, this Court "has wisely refrained from adopting

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[12] Plaintiffs address the governmental action issue as a predicate to their contention that the Court should adopt a "limiting construction" of § 8(a)(3) "in order to avoid constitutional issues" and their alternative contention that the Court should find §§ 8(a)(3) & 9(a) unconstitutional. *See* Resp. Br. at 3. As plaintiffs thus acknowledge, the policy of construing statutes to avoid constitutional questions if "a construction of the statute is fairly possible by which the constitutional question can be avoided," *Crowell v. Benson*, 285 U.S. 22, 62 (1932), is implicated here only upon a showing that state action *exists*, and not merely because a state action question is raised. That "policy's ultimate functions," the Court has explained, "are found in the delicacy of th[e] function [of judicial review of governmental action for constitutionality], particularly in view of possible consequences for others stemming also from constitutional roots; the comparative finality of those consequences; [and] the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority . . ." *Rescue Army v. Municipal Court*, 331 U.S. 549, 571 (1947). Decision of a state action question on the merits does not, in and of itself, put the constitutionality of the statute in doubt, nor does the resolution of such a question result in any of the other "consequences" of great moment that flow from a decision as to the constitutionality of the law. Moreover, if the presence of a lurking state action issue were sufficient to trigger the doctrine of constitutional avoidance, that doctrine would be implicated in virtually every case, since any law which authorizes or regulates private conduct can be said to raise a "state action issue."

this view and generally has measured the rights and duties embodied in a collective bargaining agreement only against the limitations imposed by Congress" and *not* by the "limitations that the Constitution imposes on congressional enactments." 431 U.S. at 252 (concurring opinion). And in *Steelworkers v. Weber*, 443 U.S. 193, 200 (1979), the Court squarely concluded that a collectively bargained affirmative action plan "does not involve state action." [13]

Moreover, if the acts of exclusive representatives were deemed to be governmental acts because the government sanctions the union's authority to act as an exclusive representative where the conditions stated in the NLRA are satisfied, a host of other private actors would have to be viewed as state actors as well. Simply stated, labor unions are not the only private entities whose authority to act is in some sense traceable to the government, nor are the NLRA and RLA the only statutory schemes which displace an individual's theoretical right (or, more accurately, freedom) to negotiate individualized agree-

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[13] *See also Black v. Cutter Laboratories*, 351 U.S. 292, 298-99 (1956) (just cause provision in collective agreement did not raise a constitutional question with respect to discharge for membership in Communist Party); *cf. Steelworkers v. Sadlowski*, 457 U.S. 102, 121 n.16 (1982); *Communications Assn. v. Douds*, 339 U.S. 382, 402 (1950).

Plaintiffs suggest that in negating the existence of "state action" in *Weber* the Court referred only to action at the state level and left open the possibility of " 'governmental action' at the *national* level." Resp. Br. at 14 n.49 (emphasis in original). As we read *Weber*, the Court was using the phrase "state action" in its customary and generic sense as synonymous with governmental action. Plaintiffs also suggest that the Court's statement in *Weber* was dictum because no constitutional issue was raised therein. But in *Sadlowski*, where the plaintiffs most assuredly raised a constitutional claim, the Court treated *Weber* as authoritative with respect to the state action issue. And in *Firefighters v. Cleveland*, —— U.S. ——, 54 L.W. 5005, 5009 n.8 (July 2, 1986) the Court distinguished *Weber* precisely on the ground that "Unlike *Weber* which involved a private employer this case [*Firefighters*] involves a public employer whose voluntary actions are subject to the strictures of the Fourteenth Amendment."

ments, yet this Court has found state action lacking in a host of analytically indistinguishable circumstances.

Thus, a state statute creating a regulated, but privately owned, monopoly to provide utility services confers "special legal powers and privileges," Resp. Br. at 5, on the monopoly and displaces the individual's opportunity to purchase the utility's services from another provider, yet *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1975), teaches that the actions of such monopolies do not constitute state action. And the grant by government of the exclusive right to license the use of certain terms by definition empowers the party granted that right, and correspondingly limits the freedom of others to use those terms, but the holder of the right is not thereby turned into a government agent subject to the Constitution. *San Francisco Arts & Athletics v. USOC*, —— U.S. ——, 55 L.W. 5061 (June 25, 1987). *See* Pet. Br. at 18-19.

Plaintiffs would wish away these cases on the ground that all arose "outside the peculiar area of labor relations." Resp. Br. at 15. But plaintiffs fail to show why for the purpose of the state action doctrine "labor relations" is a "peculiar" area. And the truth of the matter is that these cases are not the product of some random decisional process but are all governed by the same basic constitutional principle: congressional or state conferral of extensive powers upon private entities—even "monopoly" powers—does not make the actions such entities take of their own volition governmental action. That principle is fully applicable to the labor relations context and is fatal to plaintiffs' state action theory.

B. Plaintiffs base their entire governmental action argument on a single paragraph of dictum from *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192, (1944), a decision that aside from that paragraph does not even mention the state action doctrine. Plaintiffs assert that "*Steele* fixes the locus of 'governmental action" in exclusive representation," Resp. Br. at 12, and is "the

controlling decision on the *quasi*-governmental nature of exclusive representation," *id.* at 5 (emphasis in original). Plaintiffs badly misread *Steele*.

Despite their professed indignation over our failure to discuss *Steele* in our opening brief, the fact of the matter is that plaintiffs themselves did not rely on *Steele* in their principal brief below; indeed, the decision plaintiffs now term "seminal and still-controlling" was not cited even once in the section of that brief headed "Supreme Court Precedent" (or elsewhere in plaintiffs' twenty-page discussion of the state action issue).[14] Nor is plaintiffs' previous disinclination to rely on *Steele* below surprising, for in truth *Steele* is not in point.

"The question" presented to the Court in *Steele* was "whether the Railway Labor Act imposes on a labor organization, acting by authority of the statute as the exclusive bargaining representative of a craft or class of railway employees, the duty to represent all employees in the craft without discrimination because of their race." 323 U.S. at 193-94. The Court answered that statutory question in the affirmative, and stated its holding in purely statutory terms:

> We hold that the language of the Act to which we have referred, read in light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them. [*Id.* at 202-03]

Plaintiffs ignore *Steele's* holding and the analysis of the RLA's language and purpose that formed the predicate for that holding and base their analysis of *Steele* on the following dictum at the outset of the Court's opinion:

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[14] *See* Brief in Response to Appellants/Cross-Appellees and in Support of Cross-Appeal in C.A. 4 Nos. 83-1955, 83-1956, at pp. 10-30. Plaintiffs first relied on *Steele* in their Supplement Brief of Appellees/Cross-Appellants on Rehearing *En Banc* at 10-12.

> If, as the state court has held, the Act confers this power [of exclusive representation] on the bargaining representative of a craft or class of employees without any commensurate statutory duty toward its members, constitutional questions arise. For the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights. If the [RLA] purports to impose on petitioner and the other Negro members of the craft the legal duty to comply with the terms of a contract whereby the representative has discriminatorily restricted their employment for the benefit and advantage of the Brotherhood's own members, we must decide the constitutional questions which petitioner raises in his pleading. [*Id.* at 198-99]

Contrary to plaintiffs' contention, this passage does not state that absent a statutory constraint on a union's conduct as exclusive representative, the union would face constitutional constraints. Rather, the *Steele* Court said that absent a statutory constraint, "constituional quesions would arise"—"questions which petitioner raises in his pleading"—and that the Court would have to "decide" those questions.

Among the "constitutional questions" which the petitioner raised in *Steele* and which the Court would have had to face had the Court not read the RLA as creating a *statutory* duty of fair representation was the very question which plaintiffs pose here, *viz.*, whether the grant of exclusive representative status to a union so implicates the government in the union's conduct as to transform that conduct into governmental conduct.[15] But nothing in *Steele* supports the assumption that plaintiffs here make that by noting the existence of a constitutional

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[15] *See* Petition for Writ of Certiorari in No. 826, October Term, 1943, at 16-17.

question *Steele* somehow supplies an answer to that question, much less that *Steele* supplies the answer for which plaintiffs contend in this case.

Indeed, if contrary to our understanding of *Steele*, that decision could be read to decide that granting a union the status of an exclusive representative transforms all of that union's conduct as exclusive representative into state action, that conclusion could no longer be viewed as authoritative. As we have just seen, in the years since *Steele* this Court has decisively rejected that conclusion, pp. 15-16, *supra*, and, of at least equal importance, the Court has likewise decisively established a general principle of constitutional law that entirely negates the possibility of reaching such a conclusion, pp. 16-17, *supra*.[16]

CONCLUSION

For the reasons stated above, and in our opening brief, the judgment should be reversed.

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[16] Plaintiffs devote a large portion of their brief to arguing the merits of the "constitutionality *vel non* of the NLRA if 'government action' exists and [the union's] unlimited statutory construction is adopted." Resp. Br. at 29. As that formulation of plaintiffs' constitutional claims makes clear, those claims are dependent upon the existence of state action.

Unless a union's actions in negotiating and enforcing a union security agreement were attributable to the government, the fact that the Act permits such agreements would be of no constitutional moment. As even plaintiffs acknowledge, the Constitution does not impose any affirmative duty on the government to proscribe private conduct or private agreements and thus *state inaction* does not give rise to a constitutional claim. Accordingly, our showing in text that the government is not implicated in the private negotiation and enforcement of union security agreements to industries covered by the NLRA is dispositive of all plaintiffs' constitutional challenges.

Respectfully submitted,

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